STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of KURT S. WINTERS, Deceased.

PRESTON ELLIS,

Petitioner-Appellee,

and

ESTATE OF KURT S. WINTERS, Deceased, and VIRGINIA CARDWELL, Personal Representative of the Estate of Kurt S. Winters, Deceased,

Interested-Parties-Appellees,

v

DIANE M. WINTERS, former Personal Representative,

Respondent-Appellant.

UNPUBLISHED
March 15, 2007

No. 265183
Washtenaw Probate Court
LC No. 02-000568-DE

Before: Fort Hood, P.J., and White and Borrello, JJ.

PER CURIAM.

Respondent initially served as the personal representative of the estate of her deceased brother, Kurt S. Winters. After she filed her second Account of Fiduciary, petitioner objected to the accounting on the ground that the fiduciary fees she charged the estate on behalf of herself and her sister, Laurie Ruby, who assisted respondent with the administration of the estate, were excessive. Respondent appeals the probate court's order that denied her request for the return to the estate of excavating equipment that was previously distributed according to the decedent's will, and that limited the fiduciary fees paid by the estate to her and Ruby to a maximum of $15,000 or one and one-half percent of the value of the estate, plus documented expenses. For the reasons set forth in this opinion, we affirm the rulings of the probate court.

Respondent argues that the probate court erred when it reduced and limited the fiduciary fees received by respondent and her sister. According to respondent, the services provided were necessary and valuable, and the charges were reasonable based on the time spent, the size of the estate, the kinds of services provided and the skill and experience required. In addition, she

argues that her efforts saved the estate thousands of dollars, which should have earned her a higher fiduciary fee.

We review the decision to allow fiduciary fees for a personal representative for an abuse of discretion. *In re Baird Estate*, 137 Mich App 634, 637; 357 NW2d 912 (1984). A trial court has not abused its discretion if it selects a "reasonable" or "principled outcome" when more than one correct outcome is possible. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

The Estates and Protected Individuals Code (EPIC) applies because these proceedings commenced after the EPIC's effective date of April 1, 2000, and no accrued rights will be impaired by its application. MCL 700.8101; *In re Smith Estate*, 252 Mich App 120, 126; 651 NW2d 153 (2002). Under the EPIC, a "personal representative is entitled to reasonable compensation for services performed." MCL 700.3719. It is also proper, under the EPIC, for the probate court to order a refund of excessive compensation. MCL 700.3721. What is "reasonable compensation" under the EPIC has not been discussed in a published decision. However, under the revised probate code (RPC), a personal representative is entitled to receive "reasonable expenses" and "just and reasonable" compensation. *In re Baird*, 137 Mich App 634, 637; 357 NW2d 912 (1984). The person claiming the compensation has the burden to prove that the services performed were necessary and that the charges were reasonable. *Id*. at 637-638. In determining whether a fee is reasonable, "[e]ffort expended may be an indicator of value, but cannot be considered dispositive." *Id*. at 638. Rather, a court should weigh "the effort expended, . . . the value to the estate of the services performed, and whether the claimed services were performed for the estate's benefit or on its behalf." *Noble v McNerny*, 165 Mich App 586, 601; 419 NW2d 424 (1988). A personal representative's fee can be unreasonable even if the personal representative expends considerable time and effort. See *Becht v Miller*, 279 Mich 629, 640; 273 NW 294 (1937).

Respondent argues that the $65,000 paid to her and her sister was reasonable because they expended a great deal of effort on behalf of the estate and provided valuable services which saved the estate many thousands of dollars. Respondent's records show that she worked 533 hours and charged $75 per hour for her services. Her sister worked 288 hours and charged $25 per hour. Petitioner's expert witness testified, however, that both the hourly rate and the hours expended were excessive for the size and complexity of the estate. The expert, noting that the normal fee of a personal representative in the county was $35 to $45 per hour, opined that the skills and experience of respondent did not justify the premium hourly rate she charged. He further noted that respondent charged a minimum of one quarter hour for any task, and that she charged for 91 hours of travel time at the full hourly rate. In addition, although the major issues in the estate were resolved by the fall of 2002, she recorded an additional 275 hours over the next two years. We cannot find from petitioner's expert's testimony and our review of the record that the probate court abused its discretion by ruling both that the time claimed by respondent and the rate of compensation were excessive.

Respondent contends that the value to the estate of the services she performed must also be considered, and she may receive higher compensation for saving the estate money. It is true that the value to the estate of the services performed must be considered. *Noble*, *supra* at 601. However, respondent's claims that she benefited the estate by $110,000 lack record support. The sale for which she claims she "saved" $46,000 in real estate commissions was pending when her

brother died. In addition, the expert witness questioned whether she actually "saved" the estate any money by selling other properties without a realtor, because a realtor may have obtained a better sales price. Moreover, she may have taken more time to accomplish tasks than a higher-paid professional would have, which negated any savings. Finally, a significant portion of the costs respondent allegedly saved the estate were offset by the fees charged by her sister and herself. Under these circumstances, the court did not abuse its discretion by finding her extra efforts did not justify the fiduciary fees charged. The court correctly reduced the fees payable and ordered a refunding to the estate of the excessive fees paid. *Becht, supra* at 640-641.

Respondent also argues that petitioner did not object to the fees reported in the first accounting, and thus, a retroactive limit to fees is improper. Respondent waived appellate consideration of this issue by failing to properly support her claim of error. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Respondent next argues that the probate court erred when it allowed expert witness testimony by James Nelson, an experienced probate attorney, regarding fiduciary fees in Washtenaw County. Respondent claims that because the witness lacked knowledge of all of the details of the estate, and had not reviewed the voluminous records, he did not have the proper foundation upon which to base an opinion. Respondent's claim lacks merit.

This Court "reviews a trial court's rulings concerning the qualifications of a proposed expert witness for an abuse of discretion." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). The admission of expert testimony requires that: (1) the witness be an expert; (2) facts are in evidence which require or are subject to examination and analysis by a competent expert; and (3) the knowledge is "in a particular area which belongs more to an expert than to the common man." *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 215; 457 NW2d 42 (1990). A witness may be qualified as an expert by knowledge, skill, experience, training or education. MRE 702. Qualifications must be broadly applied. *Grow v W A Thomas Co*, 236 Mich App 696, 713; 601 NW2d 426 (1999). "The critical inquiry with regard to expert testimony is whether such testimony will aid the factfinder in making the ultimate decision in the case." *People v Smith*, 425 Mich 98, 105; 387 NW2d 814 (1986); MRE 702.

The proffered witness, a licensed attorney for over 30 years, testified that approximately half of his practice was probate-related, and that he was familiar with fees charged for estates similar to that of the decedent. The record reveals that he possessed more knowledge than a "common man" would about the reasonableness of fiduciary fees. Further, there was a question of fact, i.e., whether the personal representative fees were reasonable, that was subject to his analysis. His testimony regarding reasonable rates of compensation for personal representatives and institutional fiduciaries aided the factfinder in determining whether the fees charged by respondent were reasonable. In short, the probate court properly allowed his testimony.

Respondent insists that, because Nelson did not review every document, his testimony was unhelpful. We find the argument unpersuasive. First, Nelson reviewed respondent's own logbook, which had been entered into evidence, and read her deposition testimony in which she outlined how much money she saved the estate. The only documentation that he did not review were respondent's records that were not introduced into evidence. An expert may base his testimony only on the facts that are (or will be) in evidence. MRE 703; *Badiee v Brighton Area Schools*, 265 Mich App 343, 370; 695 NW2d 521 (2005). Therefore, it would have been

improper for Nelson to consider the documents referenced by respondent in forming his opinion. Second, an opposing party's disagreement with an expert's opinion or interpretation of facts is directed to the weight to be given the testimony, and not its admissibility. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 401; 628 NW2d 86 (2001).

Respondent further argues that the probate court gave too much weight to the expert testimony and, thus, erred in setting the rate of reasonable compensation. However, respondent admits that the probate court opined that $35 per hour was a reasonable fee at an earlier hearing. Moreover, Nelson testified that a bank trust department would charge three percent of the estate balance, but the probate court ruled that one and one-half percent of the estate was the reasonable maximum. Thus, it is clear that although the expert assisted the court in determining a reasonable fee, the court did not rely solely on that testimony.

Respondent argues in her reply brief that Nelson was a "surprise" witness and that she had no opportunity to prepare for Nelson's testimony or offer her own expert witness. However, respondent failed to raise this issue in her brief on appeal. A reply brief may only contain rebuttal argument; raising an issue for the first time on appeal in a reply brief is insufficient to properly present it for our consideration. MCR 7.212(G); *Maxwell v Dep't of Environmental Quality*, 264 Mich App 567, 576; 692 NW2d 68 (2004). Therefore, we decline to address the issue.

Respondent also claims that the probate court erred when it refused to order the return of certain equipment distributed to petitioner. The provision of the will at issue provided: "I also give and bequeath to Ellis C. Preston all of my cars, trucks and equipment used in the business known as Action, Sanitation and Excavation, Incorporated." Respondent contends that because Action did not own the equipment, did not file tax returns, and was dissolved for failing to file annual reports, it could not "use" the equipment and vehicles. Thus, the will provision could not be carried out, and the equipment owned by the decedent should have been included in the residuary estate.

We review de novo the language used in wills as a question of law. *In re Reisman*, 266 Mich App 522, 526; 702 NW2d 658 (2005). "A fundamental precept which governs the judicial review of wills is that the intent of the testator is to be carried out as nearly as possible." *In re Allen Estate*, 150 Mich App 413, 416; 388 NW2d 705 (1986). Only where a patent or latent ambiguity appears in the document is this Court free to construe the language of the will. *Reisman*, *supra* at 527. Otherwise, we must "ascribe[] to the testator that intention demonstrated in the will's plain language." *Id*., quoting *In re Dodge Trust*, 121 Mich App 527, 542; 330 NW2d 72 (1982).

The plain language of the will unambiguously provides that the equipment and vehicles used in the business of Action—not owned by Action—was bequeathed to petitioner. Petitioner testified that he used the equipment and vehicles while working for Action. Respondent's sister testified that Action existed as a corporation at the time of the decedent's death, and that it was one of his businesses. Respondent claims that the equipment and vehicles were used by the decedent only for personal use. However, respondent testified that petitioner worked for the decedent, and that she gave petitioner the equipment in 2002 so he could continue his livelihood. Although she now asserts she never intended to distribute the equipment under the will, her original Account of Fiduciary reports that she transferred title to petitioner, and she only

questioned the propriety of the distribution after petitioner objected to her second accounting. Thus, there is sufficient evidence that the equipment and vehicles at issue were used in the business of Action and the distribution to petitioner carried out the intent of the testator. Therefore, the probate court order did not err when it affirmed the distribution and refused to order the return of the equipment and vehicles.

Lastly, respondent argues that the probate court erred by using the net value of the estate to determine a maximum reasonable fee instead of the gross value of the estate, because an institutional fiduciary would charge based on the gross value of the estate. Respondent's claim is unsupported by citation to authority, and therefore, she waived appellate consideration of this issue. *Mitcham*, *supra* at 203.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Helene N. White
/s/ Stephen L. Borrello